U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 15 June 2007

In the Matters of:

PARADIGM INFOTECH, INC.,
Employer,

on behalf of

NANDKUMAR GOSAKI, **BALCA No. 2007-INA-00003**
ETA No. P-04264-05932

PURNA KATRAPATI, **BALCA No. 2007-INA-00004**
ETA No. P-05005-11345

JEEVAN PATIL, **BALCA No. 2007-INA-00005**
ETA No. P-04278-12427

AJAY KUMAR VASIREDDY, **BALCA No. 2007-INA-00006**
ETA No. P-04278-12609

Aliens.

Appearances: Harvey Shapiro, Esquire
New York, New York
For the Employer and the Aliens

Certifying Officer: Stephen W. Stefanko
Philadelphia, Pennsylvania

Before: **Chapman, Wood and Vittone**
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

These appeals arose from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification in the above-captioned matters. Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations.[1] Because of the similarity of the facts and issues raised, these cases have been consolidated for decision. *See* 29 C.F.R. § 18.11.

STATEMENT OF THE CASE

In late 2003 and early 2004, the Employer, Paradigm Infotech, Inc., filed a number of applications for labor certification to enable the alien workers to fill the positions of "Programmer Analyst" and "Software Engineer – Application."[2] In each application the Employer listed the business address at which the incumbent would work as "various worksites in the United States."[3]

The CO issued a Notice of Findings ("NOF") proposing to deny certification for each of the applications based on violations of 20 C.F.R. § 656.20(c)(8).[4] The CO advised the Employer that it was concerned with the legitimacy of the position in Erie, Pennsylvania at the time of filing and whether the office was established for the purpose of obtaining alien labor certifications. The CO noted that an application for alien employment certification is to be filed with the State Workforce Agency ("SWA") having

[1] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised on Apr. 1, 2004), unless otherwise noted. We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c).

[2] 2007-INA-03 at AF 203; 2007-INA-04 at AF 205; 2007-INA-05 at AF 204; 2007-INA-06 at AF 202.

[3] *Id.* (one also stated "including PA" 2007-INA-03 at AF 203).

[4] 2007-INA-03 at AF 199-201; 2007-INA-04 at AF 201-203; 2007-INA-05 at AF 200-202; 2007-INA-06 at AF 198-200.

jurisdiction over the area of intended employment; however, for job opportunities which involve flexi-place work arrangements where the alien works in the field or from home, or when frequent location changes are required, he advised that applications must be filed with the SWA having jurisdiction over an employer's headquarters or main office. The CO observed that the Employer's website indicated offices in Maryland, Wisconsin, Los Angeles, Connecticut and Pennsylvania, but that he had been advised by the Los Angeles Office that the company's headquarters were in Columbia, Maryland. The CO observed that it appeared that the Employer may have filed the applications in Pennsylvania not only to benefit from shorter processing times compared to Maryland, but also to avoid paying higher prevailing wages (as much as $10,000 less per year in the Erie, Pennsylvania Metropolitan Statistical Area ("MSA") versus the Columbia, Maryland MSA). The NOFs were detailed and provided specific instructions on what the Employer's rebuttal was to address.

The Employer submitted almost identical rebuttal in each of the applications.[5] The Employer contended that a Pennsylvania office was established to service its largest clients based in northwestern Pennsylvania, and that pursuant to Article 2.6 of the IT Resource Company Agreement with one of the companies (copy submitted), the Employer had agreed to open an office in northwest Pennsylvania on or before April 1, 2003. The Employer further stated that some travel to client sites would be required by the prospective employee as indicated in the labor certification application. As directed by the CO, the Employer submitted numerous documents including client lists, a lease agreement, photos of the office, payroll records, staffing charts, tax returns and recruitment reports.

The CO issued Final Determinations denying labor certification in each of the applications now before us on appeal.[6] The CO found that the contracts and purchase orders submitted by the Employer verified its relationship with both companies in Erie,

[5] 2007-INA-03 at AF 9-198; 2007-INA-04 at AF 8-200; 2007-INA-05 at AF 9-200; 2007-INA-06 at AF 8-197.

[6] 2007-INA-03 at AF 4-7; 2007-INA-04 at AF 4-7; 2007-INA-05 at AF 4-7; 2007-INA-06 at AF 4-7.

Pennsylvania, but that the agreements and all of the orders identified its company's address as 8850 Stanford Boulevard, Suite 1600, Columbia, Maryland. The contract was noted as short-term in nature, from January 2003 to June 2003, with the option to renew. The CO noted that payroll records reflected that the Employer's employees work from many different locations in the United States, including Illinois, New Jersey, California, Pennsylvania, Michigan, Alabama, Kansas, Alabama, Georgia and Delaware. The CO cited the Employer's 2004 Pennsylvania Corporate Tax Returns as confirming its headquarters as located in Columbia, Maryland.

The CO also cited a number of issues regarding the Employer's office space in Pennsylvania. He noted that the lease for the Employer's new office location is month to month, raising concerns as to the permanency of its Erie location. The lease showed the rented space as 2500 square feet of space with 14 parking spaces allotted, yet according to the CO's records the Employer had submitted 62 Applications for Alien Employment Certification and had recruited 43 U.S. workers[7] for this location. The CO questioned the reality of at least 100 workers being employed in a 2500 square foot office with only 14 parking spots, and further noted that the Employer's counsel had advised the CO in a January 19, 2006 conversation that many of the Employer's employees do not necessarily work out of its Erie, Pennsylvania office. Photographs of the office submitted showed no fax machines, copy machines, file cabinets or personal effects indicating that it is actually inhabited by workers. Moreover, the CO noted that the staffing chart submitted for the Employer's Erie, Pennsylvania office indicated a Sr. Vice President, 7 Senior Software Engineers, 4 Senior Programmer Analysis, 10 Software Engineers, 12 Programmer Analysts, 1 Office Manager and 10 Interns -- a staff size that could not be accommodated in the office space leased.

The CO noted that all of the Employer's advertisements in *Computerworld* indicated that "traveling is required" and that on the ETA 750 Part A Form, item 7, the address where Aliens will work is listed as "various work sites in the U.S." Inasmuch as

[7] 2007-INA-03 at AF 198.

the nature of Employer's business was for workers to be assigned to different client locations, the CO advised that DOL's policy requires the Employer to file the application at the long term worksite or if that is unknown, at the company headquarters. Given the short-term nature of the Employer's contracts, the inadequate office space and that payroll records confirmed that its employees work from many different locations, the CO determined that the Employer had not provided a convincing argument as to why the application was not filed at the company headquarters in Columbia, Maryland.

On appeal, the Employer asserts that while its headquarters are located in Maryland, the job opening, whether at its branch office in Pennsylvania or at client sites in Pennsylvania, will be located in the Commonwealth of Pennsylvania, and on this basis the correct jurisdiction for filing of the application is the Commonwealth of Pennsylvania.

DISCUSSION

The requirement of a *bona fide* job opportunity arises out of 20 C.F.R. § 656.20(c)(8), which states that an employer must clearly show that the "job opportunity has been and is clearly open to any qualified U.S. worker." An employer bears the burden of proving that a *bona fide* job opportunity exists and is open to U.S. workers. *Amger Corp.*, 1987-INA-545 (Oct. 15, 1987) (*en banc*); *Modular Container Systems, Inc.*, 1989-INA-228 (July 16, 1991) (*en banc*). In the instant cases, the CO was not concerned with whether the Employer was offering *bona fide* positions for Programmer Analysts and Software Engineers, but with whether the positions would legitimately be considered to be located in Erie, Pennsylvania, given that the applications indicated that the work would occur in various locations throughout the U.S. rather than a fixed location.

A panel of the Board recently addressed a similar set of applications for labor certification in which the employer had set up a "virtual" office in Delaware for workers who would work in various locations throughout the U.S., in part because it could control

where the labor market would be tested, and because Delaware had faster labor certification processing than other locations. *eBusiness Applications Solutions, Inc.*, 2005-INA-87, et al. (Dec. 6, 2006). The panel was not concerned with a motive to obtain faster processing, but found that a *bona fide* job opportunity issue is raised where it appears that an employer is attempting to test a labor market that is not necessarily related to the location of the work in order to limit the likely pool of U.S. applicants. In *eBusiness Applications Solutions, Inc.* the panel found that the Delaware office was an artifice used by the employer to attempt to control where the labor market would be tested, and therefore affirmed the denial of certification.

The Immigration and National Act, 8 U.S.C. § 1182(a)(5)(A), provides that "[a]ny alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is excludable, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that … there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor …." (emphasis added). Thus, the Department of Labor's regulations require an employer to prove through a test of the labor market that that there are not sufficient workers in the United States who are able, willing qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work, and that employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

As noted in *eBusiness Applications Solutions, Inc.*, the regulations do not explicitly address the issue of unanticipated work sites. The Employment and Training Administration addressed this issue in ETA Field Memorandum 48-94, § 10, which provided that "[a]pplications involving job opportunities which require the Alien beneficiary to work in various locations throughout the U.S. that cannot be anticipated should be filed with the local Employment Service office having jurisdiction over the area in which the employer's main or headquarters office is located." In *eBusiness*

Applications Solutions, the panel held that this "Memorandum fills a gap in the statute and implementing regulations by recommending the proper location for filing of the application in circumstances where the location for the proposed employment of the Alien is uncertain. The Memorandum constitutes a reasonable construction of the regulations given the underlying purpose of the statute." The panel observed that the Memorandum did not impose an inflexible mandate about a filing location, but also observed that "nothing in the regulatory scheme obliges a CO to process an application at a location where an employer happens to choose to file, especially where it appears that the employer chose that location to avoid recruiting in a more relevant labor market." The panel observed that the issue where to file an application in the case of a job offering with unanticipated work sites "is not so much whether the location of filing of the applications was permissible, but whether the Employer is testing the labor market in a place appropriate for the position offered."

The instant cases are somewhat different than those presented in *eBusiness Applications Solutions* in that the Employer actually had some business connection to the Erie, Pennsylvania area,[8] and we do not find that the Employer's Pennsylvania office was established solely for purposes of supporting the filing of labor certification applications. However, a mere business connection with a location, standing alone, does not establish that such a location is the appropriate place to make a labor market test.[9] Again, the

[8] The Employer submitted a copy of an "IT RESOURCE COMPANY AGREEMENT" as justification for its filing its application in Pennsylvania. The agreement states, in part, that the Employer "will open a regional office in Northwest Pennsylvania . . . on or before April 1, 2003. This office will, at a minimum, be a physical location with mail delivery, phone service and physical space suitable for at least five (5) IT Professionals." 2007-INA-03 at AF 74-76; 2007-INA-04 at AF 73-75; 2007-INA-05 at AF 74-76; 2007-INA-06 at AF 73-75.

[9] The Employer attempted to explain its filing of these applications in Pennsylvania with evidence that it established a Pennsylvania office to service its largest clients, which are based in northwestern Pennsylvania. However, the Employer both advertised and described the location of its job opportunities in the ETA Form 750A as "various worksites in the United States" with "travel required," and did not list Pennsylvania as the place of intended employment. Moreover, the Employer's payroll records reflect that its employees work and pay taxes in more than twenty different states. The record further indicates that one of the Aliens for which certification is sought resides in California while his place of employment is listed as working for the Employer in various worksites in the United States, including Pennsylvania. 2007-INA-04 at AF 203, 205-206. The CO raised numerous valid concerns about the office space in Pennsylvania, including its inadequacy for the number of employees and business the Employer has alleged is conducted there. All of the contract and purchase orders from the Employer's clients in Erie, Pennsylvania, dated 2001 through 2005, reflect the Employer's address as Columbia, Maryland. 2007-

instant cases are somewhat different than *eBusiness Applications Solutions* in that the labor market may have been adequately tested by publication in a national trade journal rather solely in local publications. However, the job offer used a prevailing wage for the Erie, Pennsylvania Metropolitan Statistical Area ("MSA"), which the CO cited as being as much as $10,000 less per year than the prevailing wage for the Employer's headquarters in the Columbia, Maryland MSA. Because the Appeal File does not establish a fixed work location in the Erie, Pennsylvania MSA, and the Employer's job description indicated that the place of employment was at "various work sites within the United States" with no fixed "intended area of employment," we find that the use of the Erie, Pennsylvania MSA prevailing wage was artificial and misrepresented the appropriate wage rate for this job of potentially national scope. Where a job will involve various unanticipated work sites, the policy stated in ETA Field Memorandum 48-94, § 10, that the appropriate venue for filing the application is the jurisdiction covering the employer's main or headquarters office is reasonable, and the mere business presence of an employer in a different MSA is not, in itself, sufficient reason for departing from that policy.

The Appeal Files in these cases strongly suggest that the Employer is offering *bona fide* job opportunities for a Programmer Analyst and Software Engineers; however, there is ample evidence to support the CO's conclusion that the Employer is not offering *bona fide* opportunities for such positions with an intended place of employment in Erie, Pennsylvania. Thus, we affirm the denial of labor certification in the above-captioned cases.

INA-03 at AF 20-73, 2007-INA-04 at AF 19-72, 2007-INA-05 at AF 20-73, 2007-INA-06 at AF 19-72. The lease is month to month, lacking permanency, and the size of the office appears inadequate for the number of employees the Employer has represented as working there. The Employer's counsel advised the CO in a January 19, 2006 conversation that many of the Employer's employees do not necessarily work out of its Erie, Pennsylvania office, which further supports a finding that the appropriate jurisdiction for the filing of the labor certification applications is in Maryland where its headquarters is located.

ORDER

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's denial of labor certification in the above-captioned matter is **AFFIRMED**.

For the panel:

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JOHN M. VITTONE
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.